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## RACIAL DISCRIMINATION IN UNION MEMBERSHIP

The Supreme Court of the United States in recent years has held discrimination in partially state supported schools unconstitutional.<sup>1</sup> It has also held that discriminatory acts in the federally controlled school system are violative of the due process clause of the fifth amendment.<sup>2</sup> Can this doctrine of school integration be applied to membership in labor unions? Is racial separation and exclusion, inherently unequal in public schooling, a fortiori unequal in the exercise of federal statutory bargaining power? If it is, should labor unions exercising federal statutory bargaining powers be required to admit negroes to membership?

A recent United States District Court case, *Oliphant v. Brotherhood of Locomotive Enginemen & Firemen*,<sup>3</sup> may put this issue squarely before the United States Supreme Court.<sup>4</sup> In the *Oliphant* case, negroes were refused admission to the Brotherhood solely because of color. The Brotherhood was the exclusive bargaining agent under the Railway Labor Act<sup>5</sup> for both white and negro firemen. The district court admitted the action was discriminatory,<sup>6</sup> but denied the negroes admittance to the union. The opinion stated that the union was a private organization and certification as exclusive bargaining agent by the National Mediation Board<sup>7</sup> did not clothe the union with the attributes of a federal agency so as to avail the petitioners relief under the fifth amendment.<sup>8</sup>

Ever since *Gibbons v. Ogden*,<sup>9</sup> Congress has expanded its power to regulate intercourse among the states<sup>10</sup> to include almost everything that can reasonably be said to touch or affect interstate commerce.<sup>11</sup> Railroads operating among the states quite naturally fall within the area of congressional control. Federal regulations for safety<sup>12</sup> have been held constitutional; even when the regulation extended to control intrastate rates,<sup>13</sup>

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1. *Florida ex rel Hawkins v. Board of Control of Florida*, 350 U.S. 413 (1956); *Lucy v. Adams*, 350 U.S. 1 (1955); *Brown v. Board of Educ. of Topeka, Kansas*, 347 U.S. 488 (1954); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

2. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

3. *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen*, 156 F. Supp. 89 (N.D. Ohio 1957).

4. The *Oliphant* case was affirmed by the Circuit Court of Appeals, 27 U.S.L. WEEK 2271 (U.S. Dec. 9, 1958).

5. Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. § 151-163 (1952).

6. *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen*, 156 F. Supp. 89, 91 (N.D. Ohio 1957). "There is no question that the evidence presented established the fact that these plaintiffs and members of their class are discriminated against in respect of their representation and participation; their conditions of employment, and other matters relating to such employment."

7. Railway Labor Act, 48 Stat. 1195 (1934), 45 U.S.C. § 154 (1952).

8. U.S. CONST. amend. V.

9. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

10. U. S. CONST. art I, § 8.

11. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

12. *Southern Ry v. United States*, 222 U.S. 20 (1911).

13. *Railway Comm'rs. of Wisconsin v. Chicago, Burlington & Quincy R.R.*, 257 U.S. 563 (1922).

it was held to affect interstate commerce and thus became the proper subject of federal regulation. The federal commerce power is indeed as "broad as the economic needs of the nation."<sup>14</sup>

The problems of the interstate carrier have become national. When local manufacturing disturbances were held to affect the manufactured product in interstate commerce,<sup>15</sup> the national legislature felt the need to establish federal agencies which would promote industrial peace within the railroads that transported the manufactured product among the states.<sup>16</sup> Quarrels arising between the railroads and the unions representing the workers come under the purview of the commerce clause, and the federal courts have primary jurisdiction<sup>17</sup> to enforce this congressional act which is supreme to state laws and constitutions.<sup>18</sup>

Federal courts have jurisdiction to entertain non-diversity suits under the National Labor Relations Act.<sup>19</sup> The interstate commerce labor field is pre-empted by the federal action, and states may not regulate labor relations which fall within the jurisdiction of the National Labor Relations Board.<sup>20</sup> This is true even though the National Labor Relations Board has declined to assert its jurisdiction.<sup>21</sup> Whenever there is no administrative remedy under the Railway Labor Act, there is also a right to go into the federal courts.<sup>22</sup> Internal issues concerning the duly designated bargaining agent are not justiciable for the federal courts,<sup>23</sup> nor does the district court generally have jurisdiction to review action of the National Mediation Board in issuing the certificates of representation.<sup>24</sup> Of course, before the aggrieved party can invoke the jurisdiction of the federal courts he must exhaust his administrative remedies.<sup>25</sup>

The actions of the exclusive bargaining union under the Railway Labor Act come under federal jurisdiction; and the union must represent fairly

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14. *American Power & Light Co. v. Securities & Exch. Comm'n.*, 329 U.S. 90 (1946).

15. *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

16. *Railway Labor Act*, 44 Stat. 577 (1926), 45 U.S.C. § 151a (1952).

17. *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956). Which held that the Railway Labor Act, allowing closed shops, is not violative of first or fifth amendments and within the power of Congress notwithstanding state constitutions to the contrary.

19. *Tunstall v. Brotherhood*, 323 U.S. 210 (1944).

20. *National Labor Relations Act*, 61 Stat. 139 (1947), 29 U.S.C. § 153 (1956).

21. *Cuss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); Comment, 18 LA. L. REV. 149 (1957).

22. *Brotherhood of R. R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Graham v. Brotherhood of Firemen*, 338 U.S. 232 (1949); *Tunstall v. Brotherhood*, 323 U.S. 210 (1944); *Steele v. Louisville & Nashville R. R.*, 323 U.S. 192 (1944). Compare, *Hayes v. Union Pac. R. R.*, 88 F. Supp. 108 (S. D. Calif. 1950).

23. *General Comm. v. M-K-T R. R.*, 320 U.S. 323 (1943); *General Comm. v. Southern Pac. R. R.*, 320 U.S. 338 (1943).

24. *Switchmen's Union v. Board*, 320 U.S. 297 (1943).

25. *Porter v. Investors' Syndicate*, 286 U.S. 461 (1931); *Goldsmith v. Board of Appeals*, 270 U.S. 117 (1926); *Martin v. Favell*, 344 Mich. 215, 73 N.W. 2d 856 (1955).

all members and non-members.<sup>26</sup> Contract discrimination founded upon color would be violative of the due process clause of the fifth amendment. The *Steele* case<sup>27</sup> is representative of this class action against a union whose constitution denies negroes membership; and where the union is the exclusive bargaining agent for the negro as well as its own members. The union, being held as a quasi-governmental agency in this respect, may not bargain to the detriment of the negro.<sup>28</sup> Nor can the exclusive bargaining agent discriminate as to the auxiliary colored union.<sup>29</sup> The separate but equal doctrine in *Plessy v. Ferguson*<sup>30</sup> has been overruled in the school system, and there is no reason to continue its application in the labor union. A labor union functioning as a bargaining agent under the Railway Labor Act is not to be regarded as a wholly private association of individuals free from all constitutional or statutory restraints to which public agencies are subjected.<sup>31</sup>

If the state courts were requested to decide questions involving union discrimination, a judgment for the union should be held within the doctrine of *Shelly v. Kraemer*.<sup>32</sup> This discriminatory act by the union enforced by the state would then be an act of the state prohibited by the fourteenth amendment.<sup>33</sup> At least one state court has found union discrimination to be a violation of state and national public policy without recourse to the fourteenth amendment.<sup>34</sup> Thus, an appeal to the state court by the negro worker for union membership when denied by the court, becomes a state act of discrimination and unconstitutional under the fourteenth amendment.<sup>35</sup>

Even if the labor union must fairly represent all for whom it purports to bargain, must it admit all into membership regardless of color? Can the union represent all fairly and still be discriminate in its membership? The first case characterizing labor unions as voluntary associations was decided in 1880.<sup>36</sup> Since then there has never been a legally protected right to join a union.<sup>37</sup> It has been held that labor unions have a legal

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26. *Brotherhood of R. R. Trainmen v. Howard*, 343 U. S. 768 (1952); *Graham v. Brotherhood of Firemen*, 338 U. S. 232 (1949); *Tunstall v. Brotherhood*, 323 U. S. 210 (1944); *Steel v. Louisville & Nashville R. R.*, 323 U. S. 192 (1944); *Graham v. Southern Ry.*, 74 F. Supp. 663 (D. C. 1947).

27. *Steele v. Louisville & Nashville R. R.*, 323 U. S. 192 (1944).

28. *Comments*, 1953 Wis. L. Rev. 516 (1953); 5 *STAN. L. REV.* 135 (1952).

29. *James v. Marinesship Corp.*, 85 Cal. 2d 721, 155 P.2d 329 (1944); *Betts v. Easley*, 161 Kan. 459, 169 P. 2d 831 (1946).

30. *Plessy v. Ferguson*, 163 U. S. 537 (1896).

31. *Betts v. Easley*, 161 Kan. 459, 169 P. 2d 831 (1946).

32. *Shelly v. Kraemer*, 334 U. S. 1 (1948); *Hurd v. Hodge*, 334 U. S. 24 (1948).

33. U. S. CONST. amend. XIV, § 1.

34. *James v. Marinesship Corp.*, 85 Cal. 2d 721, 155 P.2d 329 (1944).

35. *Ross v. Ebert*, 275 Wis. 523, 82 N. W. 2d 315 (1957); *Haller, Racial Discrimination in Unions*, 8 *LAB. L. J.* 479 (1957).

36. *Mayer v. Journeymen Stonecutter's Ass'n.*, 49 N.J. Eq. 519, 20 Atl. 492 (Ch. 1890).

37. *Cameron v. International Alliance, etc.*, 118 N.J. Eq. 11, 176 Atl. 692 (1935); *Sommes, The Right to Joint a Union*, 47 *COL. L. REV.* 33, (1947).

right to determine the eligibility of its own membership.<sup>38</sup> The state courts have been unwilling to set aside union constitutions barring colored members,<sup>39</sup> or to force the union to accept persons it had deemed unacceptable for any reason, color among them, and thus to turn a voluntary organization into an involuntary one.<sup>40</sup> The courts are not concerned<sup>41</sup> with the membership qualifications of a union which is a voluntary private organization. This leads us to a position in which the unions may discriminate by excluding negroes from membership, but may not discriminate in bargaining for the negro workers it represents.

In the instant case<sup>42</sup> the argument of the petitioners alleged that the non-admittance is in itself discrimination because the negro worker did not have a vote in the election of bargaining officials or in the formulation of bargaining objectives.<sup>43</sup> The petitioners further argued that the protection of the fifth amendment included their right to membership in the union, for negro firemen could not obtain equal representation without voice and vote in the bargaining process.<sup>44</sup> The petitioners here did not complain that the bargaining acts of the defendant union had been discriminatory as in the *Steele* case<sup>45</sup> and subsequent cases.<sup>46</sup> The question was whether the denial of membership to negroes standing alone fell within the protection of the Constitution.

In the closed shop, the Railway Labor Act provides that negroes must be admitted.<sup>47</sup> A closed shop was made non-discriminatory on the theory that the discrimination would be a denial of the right to work for a non-member could not work in a closed shop. The closed shop is not mandatory

38. *Cameron v. International Alliance, etc.*, 118 N.J. Eq. 11, 176 Atl. 692 (1935); *Ross v. Ebert*, 275 Wis. 523, 82 N. W. 2d 315 (1957).

39. *Martin v. Favell*, 344 Mich. 215, 73 N. W. 2d 856 (1955).

40. *Ross v. Ebert*, 275 Wis. 523, 82 N. W. 2d 315 (1957).

41. *Rolax v. Atlantic Coast Line R. R.*, 91 F. Supp. 585 (E. D. Va. 1950).

42. *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen*, 156 F. Supp. 89 (N.D. Ohio 1957), *aff'd* 27 U.S.L. WEEK 2271 (U.S. Dec. 9, 1958).

43. Brief for Appellants, p. (i).

44. *Ibid.*

45. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

46. *Conley v. Gibson*, 352 U. S. 818 (1957) (Latest in a series of cases affirming the *Steele* case.)

47. Railway Labor Act, 64 Stat. 1238 (1951), 45 U. S. C. § 152, Eleventh. ". . . any carrier or carriers as defined in this act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of the act Shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class: *Provided*, that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect employees to whom membership was denied or terminated for any reason other than failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

under the Railway Labor Act, only permissive.<sup>48</sup> There need not be a closed shop and apparently the unions keep an open shop in order to remain discriminatory in their membership. However, a closed shop under the Railway Labor Act is valid notwithstanding state laws or constitutions outlawing them.<sup>49</sup>

The case at hand deals with the open shop. In the open shop, the Railway Labor Act makes no provision for non discrimination in membership.<sup>50</sup> Obviously Congress could have so provided.<sup>51</sup> In the open shop, courts have only gone so far as to protect negro non-members from unfair representation in bargaining. The right so far delineated is for fair representation<sup>52</sup> not membership.

Is this position, that an organization created to bargain for the worker can privately discriminate in its membership and at the same time carry out its avowed purpose to represent all fairly, tenable?

Generally, the legal discussions of the *Oliphant* case have pointed towards the support of the negro workers.<sup>53</sup> The arguments against racial discrimination in union membership are basically two. The first argument reasons that the fair representation guaranteed by the Railway Labor Act as interpreted in the *Steel* case<sup>54</sup> necessarily includes the right to join that union; that the denial of participation in the union is incompatible with the requirements of equal representation.<sup>55</sup> Secondly, the labor union when certified by the National Mediation Board becomes a quasi federal agency,<sup>56</sup> and certification is therefore sanction by the government of discrimination<sup>57</sup> which is prohibited by the fifth amendment. Less concrete arguments available are that non-membership would be a denial of economic opportunity, and that discrimination in membership would create a second-class citizenship.

Summarizing the position of the unions, we find that the unions are a voluntary organization under no obligation to accept all into membership.<sup>58</sup> Congress has not intended to make unions non-discriminatory.<sup>59</sup>

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48. See note 47 *supra*; "... shall be permitted . . ."

49. *Railway Employees' Dept. v. Hanson*, 351 U. S. 225, 233 (1956) (federal law is supreme and cannot be invalidated by any state law.).

50. *Railway Labor Act*, 44 Stat. 577 (1926), 45 U. S. C. § 151 (1952).

51. 104 CONG. REC. 6635 (daily ed. Apr. 26, 1958). The United States Senate on April 26, 1958, defeated a bill introduced by Senator Knowland to prohibit unions from discrimination; 96 CONG. REC. 16377 (1951) (a bill was tabled which would have prohibited certification of a union which discriminates in membership).

52. See note 26 *supra*.

53. Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LAB. L.J. 874 (1957); notes, 12 RUTGERS L. REV. 543 (1958), 29 MISS. L.J. 335 (1958).

54. *Steele v. Louisville & Nashville R. R.*, 323 U. S. 192 (1944).

55. *Railway Labor Act*, 48 Stat. 1186 (1934), 45 U. S. C. § 152, fourth, "Employees shall have the right to organize and bargain collectively through representatives of their own choosing."

56. See note 29 *supra*.

57. Comment, 12 RUTGERS L. REV. 543 (1958)

58. See notes 37-41 *supra*.

59. See note 51 *supra*.

Under the *Steele* case, the certified bargaining union need only represent all fairly. That the union is not discriminating against the negro workers in bargaining is not denied.

The United States Supreme Court has not yet determined the problem.<sup>60</sup> It must eventually meet it squarely and the desirability of increased federal control in labor will have to be weighed against its true effect.<sup>61</sup> That is, will forced membership assure fair representation?<sup>62</sup> If the Supreme Court follows its reasoning in the school segregation cases, it must hold for the negro. That this edict from the highest court in our land would establish equality is strongly doubted. Perhaps it is time to review the value judgments of what is good for the people and allow individual enterprise to rise or fall without governmental interference.

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60. The *Oliphant* case was denied certiorari by the United States Supreme Court. 355 U. S. 893 (1958).

61. Wellington, *Union Democracy and Fair Representation; Federal Responsibility in a Federal System*, 67 YALE L. J. 1327 (1958).

62. *Whitfield v. Steelworkers Local 2708*, 156 F. Supp. 430 (S. D. Tex. 1957). (Wherein negroes complained of discrimination even though they were members and officers in the union).